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No. 88-1312

In The

Supreme Court of the United States

October Term, 1988

ESTATE OF ARCHIBALD CORNETT, ET AL,
Petitioners,

vs.

ESTATE OF M. D. SIKES, ET AL,
Respondents.

BRIEF OF PANOLA COUNTY, TEXAS, ANN LEWIS RIVES, AND NEVELYN FOSHEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. Thomas Allison, III, P.C.
MERRIMAN, PATTERSON & ALLISON
P. O. Drawer 4237
Longview, Texas 75606
(214) 297-7676
Counsel of Record

Terry D. Bailey
BAILEY & BAILEY
307 W. Sabine St.
Carthage, Texas 75633

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Petitioners,

vs.

ESTATE OF M. D. SIKES, ET AL,
Respondents.

LIST OF PARTIES

PETITIONERS:

Estate of Archibald Cornett
Estate of Sally Williams Cornett
Jenny Cornett-German
Lillian German-Benjamin
Julie Payton
Betty Payton
Bailey Payton
Mary Nell Payton

Carrie Armstrong
Huey German
Jesse E. German
Annie M. Jones
Shirley J. German
Michael German
Joe German
Tommie German
Jennie L. Johnson
Bobbie J. Banks
Roy J. German
Le Otis Thomas
Sandra Felder
Clarissa Hudson
Kelly Jackson, Sr.
Beulah M. Curtis
Gwendolyn Pipkin
Kimberly Pipkin
Donna Pipkin
Eva Jean Pipkin
Sallie McMillons
Raymond Pipkin
Judy Pipkin
Steve Pipkin
Eva Pipkin
Hilda Pipkin
Many O'gilvie Williams
Thomas Pipkin
Melvina Tucker
Ruth Pipkin Yadell
Jim Payton

Alton Cornett
Willie Cornett
Vernon Cornett
Bernice Washington
Lee A. Cornetton
Robert Cornett
Leona Cornett Bars
John A. Cornett
Bernice Jones
Archie Cornett
Sallie Mae Cornett
Gates Cornett
Jewel Cornett
Marvis McMillons
Vernice Thomas
Bogus Cornett
Velma Cornett Grasple
Ruby Cornett Hall
Charles Daughtery
Ollie Tucker Hollins
Newt Tucker
Blanchard Tucker
Linda Cornett
Levada Cornett
Robert Louis Cornett
David Earl Cornett
Audrey Cornett Hines
Ada Cornett
Laura Mae Allen
Perry O'Gilvie
Leona Portley

RESPONDENTS:

Estate of M. D. Sikes
Claude (H.C.) Foshee
Nevelyn Foshee
Ann Lewis Rives
Louis Werner Saw Mill Co.,
its Successors and Assigns
County of Panola, Texas
Texaco Oil Company

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STATEMENT OF THE CASE

This is a suit brought by Petitioners pursuant to 42 U.S.C. 1981, 1982, 1983, 1985, 1986, and 1988.

The Petitioners' Statement of the Case fails to reference any portion of the record to support the statements contained therein. Respondents Panola County, Texas, Ann Lewis Rives, and Nevelyn Foshee respectfully submit that the opinion of the United States Court of Appeals for the Fifth Circuit, contained in Petitioners' Appendix, Pages 1A through 5A, and the order of the United States District Court for the Eastern District of Texas, contained in Petitioners' Appendix, Pages 8A through 12A, correctly reflect the proceedings and rulings in the Courts below, and summarize the pertinent facts.

SUMMARY OF THE ARGUMENT

The Circuit Court considered all issues raised by Petitioners and correctly determined that the Texas two year statute of limitations controlled this civil rights action. The Court further correctly determined that the Petitioners' cause of action accrued more than two years prior to the filing of this law suit, and any alleged tolling of the applicable statute of limitations ended more than two years prior to the filing of the law suit.

REASONS WHY THE WRIT SHOULD BE DENIED

The District Court granted a summary judgment on behalf of the Respondents in this case, stating that the Petitioners had filed their suit after the applicable limitations period had expired. This decision of the District Court followed the reasoning of the Fifth Circuit in *Cross v. Lucius,* 731 F.2nd 153 (5th Cir.1983). The District Court correctly determined that the Texas two year statute of limitations, found in §16.003 of the *Texas Civil Practice and Remedies Code,* applied in this case. *Peter Henderson Oil Co. v. City of Port Arthur,* 806 F2nd 1273(5th Cir.1987); *Longoria v. City of Bay City, Texas,* 779 F.2nd 1136 (5th Cir.1986). (The district court did observe that the cause of action under 42 U.S.C. 1986 was governed by the 1986 one year statute of limitations provided in that statute.) The decision of the District Court was correctly affirmed by the United States Court of Appeals for the Fifth Circuit.

The Petitioners apparently do not dispute the ruling of the Courts below that the Texas limitation period applies. The gist of the Petitioners' complaints appears to be that the Petitioners' cause of action had not accrued until shortly before the law suit was filed, and/or that the statute of limitations was tolled until shortly before the law suit was filed. Respondents Panola County, Texas, Ann Lewis Rives, and Nevelyn Foshee submit that the following facts, established by the Petitioners themselves, are pertinent to these allegations of error:

(1) By 1959, the heirs of Archibald Cornett had hired an attorney to assert a claim of title to the acreage made the basis of this law suit, including the mineral estate. (R.1237,1214.).[1] This attorney, Williams Conners, represented all of the heirs of Archibald Cornett. (R.1238,1214.). Further, attorney Conners believed his investigation revealed a conspiracy to defraud his "colored" clients. (R.1238,1214).

(2) In 1961 Petitioners employed attorney Philander Neville to help reclaim the property made the basis of this law suit. (R.1244). Pursuant to that employment, Petitioners assigned to attorney Neville a (1/4) one-fourth interest in the disputed property. (R.1220-1236). At the time this assignment was made to attorney Neville, the Petitioners were aware that a problem existed with respect to the chain of title of the property made the basis of this law suit. (R.1245).

(3) Prior to 1971 officials of Panola County allegedly refused to allow members of the Cornett family to examine public deed and tax records pertinent to the land in question. (R.1242).

(4) Any physical barring of the Petitioners from the deed records of Panola County ended approximately January 1, 1974. (R.1242-1244).

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[1] References to "R" are to the Record in the Courts below.

A. Accrual of the Plaintiffs Cause of Action

The date a cause of action accrues is a question of federal law. *Moore v. El Paso County Texas,* 660 F.2nd 586 (5th Cir.1981). The standard used to determine the accrual of a civil rights claim was stated as follows in *Lavellee v. Listi,* 611 F.2nd 1129 (5th Cir.1986), "The cause of action accrues when the Plaintiff knows or has reason to know of the injury which is the basis of the action." 611 F.2nd at 1131. Further, the Fifth Circuit Court of Appeals has stated that, "The limitations period begins to run when the Plaintiff either is or should be aware of both the injury and its connection with the alleged acts of the Defendant." *Longoria,* 779 F.2nd at 1138. As the District Court correctly noted, as early as October 2, 1961, the Petitioners were actively engaged in efforts to recover the land. They retained the services of a Chicago attorney on October 1, 1961, to reclaim the property. Further, the Petitioners' attorney was aware of an alleged conspiracy to defraud the Petitioners in 1959 and the Petitioners were allegedly physically barred from the deed records of Panola County, Texas, up to and including 1973. Thus, the Petitioners certainly were aware of their alleged injury in 1961, and of the alleged wrongful acts of the Respondents.

B. Tolling of the Statute of Limitations

The Petitioners claim that the applicable statute of limitations should be tolled is governed, again, by state law. *See, Johnson v. Railway Express Agency,* 421 U.S. 454, 95 S.Ct. 1716 (1975). The appropriate Texas case

appears to be *Borderlon v. Peck,* 661 S.W. 2nd 907 (Tex. 1983). Under *Borderlon,* fraudulent concealment of material facts may toll the statute of limitations. However, the Court in *Borderlon,* pointed out that the estoppel effect of fraudulent concealment ended when a party learned of *facts, conditions,* or *circumstances* which would cause a reasonably prudent person to make inquiry, which if pursued, would lead to discovery of the concealed cause of action. 661 S.W. 2nd at 909. (emphasis supplied). The Petitioners have stated that for many years preceding the filing of this law suit, they were attempting to recover their land. (see, e.g., Plaintiffs' answers to Defendant Texaco Oil Company's First Request for Admissions and Interrogatories, R.1237-1248). This establishes that the Plaintiffs were aware of their alleged injury over 10 years prior to this law suit being filed. Certainly, at the time they were aware of their injury, any alleged tolling of the limitations period expired.

Finally, Respondents submit that Petitioners' attempt to analogize their case to *Hohri v. United States,* ___ U.S. ___, 1075 S.Ct. 2246, 96 L.Ed. 51 (1987), was correctly considered and disposed of by the court below.

CONCLUSION

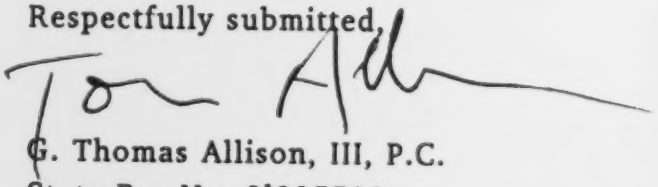
Respondents Panola County, Rives and Foshee respectfully submit to this Court that the District Court correctly dismissed this case because of its filing outside the applicable limitations period, and this decision was appropriately affirmed by the United States Court of

Appeals for the Fifth Circuit. The civil rights statutes which the Petitioners seek to assert as a cause of action existed for many years prior to their filing of this law suit. The record reveals that the Petitioners had actual knowledge of their alleged injury for many years prior to their filing of this law suit. The federal courts, in Texas and elsewhere, have been open to Petitioners for many years prior to their filing of this law suit. Respondents submit that the issues raised by the Petitioners were fully considered and correctly decided by the courts below.

Respondents Panola County, Rives, and Foshee further adopt by reference the Brief in Opposition to Petition for Writ of Certiorari of Respondent Texaco Oil Company.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this Honorable Court deny the Petition for Writ of Certiorari and for such other and further relief at law or in equity as they may show themselves justly entitled to receive.

Respectfully submitted,



G. Thomas Allison, III, P.C.
State Bar No. 01905500
MERRIMAN, PATTERSON & ALLISON
P. O. Drawer 4237
Longview, Texas 75606
(214) 297-7676
Counsel of Record

Terry D. Bailey
BAILEY & BAILEY
306 W. Sabine St.
Carthage, Texas 75633

ATTORNEYS FOR RESPONDENTS
PANOLA COUNTY, TEXAS,
ANN LEWIS RIVES AND
NEVELYN FOSHEE

CERTIFICATE OF SERVICE

I certify that three true and correct copies of the foregoing Brief of Panola County, Texas, Ann Lewis Rives, and Nevelyn Foshee in Opposition to Petition for Writ of Certiorari were served on all parties required to be served by placing the same in the United States mail, postage pre-paid, return receipt requested, addressed as follows:

Donald W. Hill
Donald W. Hicks, Sr.
Hill Hicks Collins
One Main Place
1201 Main Street
Suite 1530
Dallas, Texas 75202

Michael A. Hatchell
P. O. Box 629
Tyler, Texas 75710

SIGNED THIS 22nd day of February, 1989.

G. THOMAS ALLISON, III, P.C.